MILITARY COMMISSIONS TRIAL JUDICIARY
GUANTANAMO BAY, CUBA

UNITED STATES OF AMERICA v. IBRAHIM AL QOSI	**D___** **Defense Motion** to Dismiss for Lack of Jurisdiction (Bill of Attainder) 19 December 2008

1. Timeliness: This Motion is timely filed. *See* R.M.C. 905(b).

2. Relief Sought: The defense respectfully requests that the Court dismiss all charges against Mr. al Qosi because the statute that purports to provide the basis for the commission's jurisdiction is unconstitutional.

3. Overview:

(1) The Constitution prohibits Congress from passing bills of attainder. U.S. Const. art. I, § 9, cl. 3. The Military Commissions Act of 2006, Pub. L. No. 109-366, 120 Stat. 2600 ("MCA") is a bill of attainder because it (a) singles out a group of persons ("alien unlawful enemy combatants"), (b) for legislatively imposed punishment without judicial trial, (c) because of irreversible past conduct. *Selective Serv. Sys. v. Minn. Pub. Interest Rsch. Group,* 468 U.S. 841, 847 (1984) (internal quotation and citation omitted).

(2) Specifically, the MCA was enacted to provide for the prosecution of "alien unlawful enemy combatants." MCA § 948b(a). The MCA deprives "alien unlawful enemy combatants" of key procedural rights and evidentiary protections to which they would be entitled if they were to be prosecuted in either federal court or under the professional military justice system provided for in by the Uniform Code of Military Justice. By stripping "alien unlawful enemy combatants" of these rights and protections, Congress imposed a legislative punishment on this group based on conduct that was factually in the past. Congress, therefore, impermissibly made an adjudicative determination that a specific category of persons was deserving of legislative punishment based on beliefs and perceptions as to their past conduct or associations.

(3) Congress lacks authority to pass a law repugnant to the Constitution. *Ex parte Quirin*, 317 U.S. 1, 25 (1942). Because Congress lacked the authority to pass the MCA, this Court has no power to assert jurisdiction over Mr. al Qosi and all charges against him must be dismissed. *Marbury v. Madison*, 5 U.S. 137 (1803). In the alternative, and in order to avoid constitutional difficulties, the MCA should be interpreted to apply only prospectively.

4. **Facts:** This motion presents a question of law.

5. **Argument:**

1. Congress is Prohibited from Passing Bills of Attainder and, if the MCA is a Bill of Attainder, this Commission has No Jurisdiction over Mr. al Qosi.

(1) Congress may not pass a bill of attainder. U.S. Const. art. I, § 9, cl. 3. The Constitution provides that "no bill of attainder or ex post facto Law shall be passed" and this prohibition acts as a structural limit on Congress's power to legislate. *See Downes v. Bidwell*, 182 U.S. 244, 277 (1901); *Reid v. Covert*, 354 U.S. 1, 5-6 (1957) (plurality opinion) ("The United States is entirely a creature of the Constitution. Its power and authority have no other source. It can only act in accordance with all the limitations imposed by the Constitution.") (footnote omitted).

(2) This Court may not assert jurisdiction over Mr. al Qosi if the statutory basis for its jurisdiction is unconstitutional. *See Ex parte Quirin*, 317 U.S. at 29 ("We must therefore first inquire … whether the Constitution prohibits the trial" by military commission.). A law that is repugnant to the Constitution is void and unenforceable and the charges against Mr. al Qosi must be dismissed if this Court determines that the MCA is a bill of attainder. *See Marbury v. Madison*, 5 U.S. 137, 177 (1803); *United States v. Brown*, 381 U.S. 437, 462 (1965) (constitutional limitations on bills of attainder and ex post facto laws "'can be preserved in practice no other way than through the medium of the courts of justice; whose duty it must be to declare all acts contrary to the manifest tenor of the constitution void.'") (quoting Alexander Hamilton, The Federalist, No. 78, pp. 576-577 (Hamilton ed. 1880)).

2. The MCA is a Bill of Attainder and is Therefore Unconstitutional.

a. *The MCA Targets a Specific Group of Persons for Legislative Punishment Because of a Congressional Desire to Punish Terrorists*.

(1) A legislative act is a bill of attainder if it singles out a group based on irreversible past conduct for legislative punishment. *Selective Serv. Sys. v. Minn. Pub. Interest Rsch. Group*, 468 U.S. at 847. The MCA was established for the express purpose of establishing a system to prosecuting "alien unlawful enemy combatants." *See* MCA § 948b(a). As such, Congress specifically aimed to provide statutory authority for the prosecution of the individuals who were already detained at Guantanamo Bay at the time of the legislation's enactment. In doing so, Congress sought to deprive the detainees of specific procedural protections because of a desire to punish past conduct by terrorists – a category into which Congress generally grouped all of the detainees at Guantanamo. *Compare Cummings v. Missouri*, 71 U.S. 277, 327 (striking down clauses in the Missouri constitution that "assume that there are persons in Missouri who are guilty of some of the acts designated. …They are aimed at past acts, and not future acts.") *with*152 Cong. Rec. S10274 (statement of Sen. Bond) ("These people are not U.S. citizens….they are, by definition, aliens engaged in or supporting terrorist hostilities against the U.S.")

(2) In *Cummings*, the Supreme Court observed that the prohibition on bills of attainder is intended to shield against "the violent acts which might grow out of the feelings of the moment" and the "effects of those sudden and strong passions to which men are exposed." *Cummings*¸ 71 U.S. at 322.[1] The Supreme Court has recognized that bills of attainder are especially likely to be enacted in times where Congress believes that a particular group of persons poses *a threat to national security*. *United States v. Brown*, 381 U.S. at 453 (1965) (holding as unconstitutional a statute that "inflicts its deprivation on the members of a political group thought to present a threat to national security" noting that "such groups were the targets of the overwhelming majority of English and early American bills of attainder.")

(3) Most significantly, in *United States v. Brown*, the Supreme Court recognized the dangers posed when Congress seeks to punish a group because of its own determination that, unless punished, members of that group might pose a future threat. *Id.* at 458. The Court observed that "[h]istorical considerations by no means compel restriction on the bills of attainder to instances of retribution" noting that "[a] number of English bills of attainder were enacted for preventative purposes…." These "preventative" punishments stemmed from a judgment by the legislature that "based on past acts and associations…a given person or group was likely to cause trouble (usually, overthrow the government)" and therefore it was appropriate to inflict "deprivations on that person or group in order to keep it from bringing about the feared event." *Id*. at 458-459. The Court determined that such a legislative act was unconstitutional. *Id.* at *461*.

(4) In *Brown*, the Supreme Court also observed that a key purpose of the prohibition against bills of attainder was to serve as a "general safeguard against legislative exercise of the judicial function, or more simply – trial by legislature." *Id*. at 442. The Court struck down a statute that made it a crime for members of the Communist party to serve as officers or employees of labor unions. The Court observed that the "purpose of the statute before us is to purge the governing boards of labor unions of those whom Congress regards as guilty of subversive acts and associations and therefore unable to fill positions which might affect interstate commerce." *Id*. at 460. The Court held that Congress is not allowed to adjudicate that a specific category of persons, based on their past conduct or associations, are deserving of punishment, noting that "Congress possesses full legislative authority, but the task of adjudication must be left to other tribunals." *Id*. at 461.

(5) Likewise, in enacting the MCA, Congress sought to provide the means to punish "alien unlawful enemy combatants" because of a belief that such individuals posed a threat to national security, were guilty of terrorist acts against the United States, or were likely to commit such acts in the future. The legislative history of the MCA is instructive as to the nature of Congress's intent at the time:

- "As we consider this legislation, it is important to remember, first and foremost, that this bill is about prosecuting the most dangerous terrorist[s] that America has ever

[1] The Court quoted Justice Story who observed that bills of attainder "have been most usually passed in England in times of rebellion, or gross subserviency to the crown, or of violent political excitements; periods in which all nations are most liable…to forget their duties, and to trample upon the rights and liberties of others." *Cummings*, 71 U.S. at 323 (citing Commentaries, § 1344).

confronted, individuals like Khalid Sheikh Mohammed, the mastermind of the 9/11 attacks, or Ahbd Nashiri, who planned the attack on the USS *Cole*." 152 Cong. Rec. H7944 (statement of Rep. Sensenbrenner).

- "Until Congress passes this legislation, terrorists such as Khalid Shaikh Mohammed cannot be tried for war crimes, and the United States risks fighting a blind war without adequate intelligence to keep us safe." "Our great Nation will know no justice and his victims' families will know no justice until Congress acts by passing legislation to establish these military commissions." 152 Cong. Rec. S10243 (statement of Sen. Frist).

- "The Supreme Court case which brought about the need for this legislation deals with *Hamdan*. Let's be clear, Hamdan was Osama bin Laden's body guard and driver. This is the kind of person about whom we are talking. …These people are not U.S. citizens, arrested in the U.S. on some civil offense; they are, by definition, aliens engaged in or supporting terrorist hostilities against the U.S., and doing so in violation of the laws of war.", 152 Cong. Rec. S10274 (statement of Sen. Bond).

- "I hope my colleagues … will send a clean bill to be reconciled with the House version and sent to the President right away so that before too long we can see that some of the war criminals who sit detained in Guantanamo Bay may be brought to justice, people like Khalid Shaikh Mohammed, who was the mastermind of the 9/11 plot that killed nearly 3,000 Americans." 152 Cong. Rec. S10395 (statement of Sen. Cornyn).

- "I say that I can't think of any better way to honor the fifth anniversary of September 11 than by establishing a system to prosecute the terrorists who on that day murdered thousands of civilians and who continue to seek to kill Americans both on and off the battlefield." 152 Cong. Rec. H7936 (statement of Rep. Hunter).

- "This system…will allow for the expeditious prosecution of people who attacked our country." "Without this action, [the] United States has no effective means to try and punish the perpetrators of September 11th, the attack on the USS *Cole* and the embassy bombings." 152 Cong. Rec. H7937 (statements of Rep. Hunter).

(6) This legislative history is highly relevant to a determination as to whether or not the MCA is a bill of attainder. *See Trop v. Dulles*, 356 U.S. 86, 96 (1958) ("[t]he controlling nature of such statutes normally depends on the evidence purpose of the legislature"); *Selective Service System*, 468 U.S. at 849-850, 852-855 (discussing importance and relevance of legislative history). In *United States v. Lovett*, the Supreme Court found that a determination as to whether a statutory provision qualifies as a bill of attainder requires "an interpretation of the meaning and purpose of the section, which in turn requires an understanding of the circumstances leading to its passage." 328 U.S. 303, 307 (1946). In this case, the relevant circumstances leading to the passage of the MCA include: the context of the ongoing Global War on Terrorism and a desire to punish the perpetrators of previous terrorist acts; the Supreme

Court's decision in *Hamdan*, which struck down the Bush Administration's previously-established military commissions;[2] the early September 2006 transfer of high profile terrorist suspects, including the man accused by the Bush Administration of "masterminding" the attacks on September 11th;[3] and the November 2006 Congressional elections.[4]

(7) In providing for the prosecution of "alien unlawful enemy combatants," Congress overwhelmingly evidenced its belief that members of this identified group were dangerous to the national security of the United States. Congress' efforts were focused on providing the statutory basis to prosecute a category of persons already in Government custody. Congress' actions reflected its ostensibly incontrovertible belief that the factual circumstances that led to the detention of each individual, and the conduct that led the Government to label each detainee an "alien unlawful enemy combatant," evidenced some ongoing and general threat to the United States by this category of persons.[5]

(8) Below in this brief and in the Defense motion for dismissal based on a violation of Common Article 3, filed on the same date as this motion and incorporated herein by reference, the Defense discusses the many procedural and evidentiary rights Congress stripped from detainees. By stripping "alien unlawful enemy combatants" of specific procedural rights and evidentiary protections, Congress imposed a legislative punishment on this group based on conduct that was factually in the past.[6] Legislatively and punitively stripping a discrete group of a right, such as board membership in *Brown*, discussed *supra*, or legal rights as in this case, is the hallmark of a bill of attainder. *See e.g. Communist Party of the United States v. Subversive Activities Control Board*, 367 U.S. 1, 86 (1961) ("[the] singling out of an individual for legislatively prescribed punishment constitutes an attainder whether the individual is called by

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[2] *Hamdan v. Rumsfeld*, 548 U.S. 557 (2006). *See also* 152 Cong. Rec. H6273 (message from the President of the United States accompanying draft proposed MCA (H. Doc. No. 109-133), noting that "[t]his draft legislation responds to….*Hamdan v. Rumsfeld*.").

[3] *See e.g.* Sheryl Gay Stolberg, *President Moves 14 Held in Secret to Guantanamo*, N.Y. Times, Sept. 7, 2006.

[4] Political considerations were certainly on the minds of some in Congress as they debated the MCA: "The bill…reflects that agreement reached last week: Republicans united around the common goals of bringing terrorists to justice." 152 Cong. Rec. S10243, *S10243 (statement of Sen. Frist); "I do not believe the bill before us is constitutional. It is being rushed through a month before a major election in which the leadership of this very body is challenged." 152 Cong. Rec. S10354, *S10363 (statement of Sen. Feinstein).

[5] Certainly, there was acknowledgement by some in Congress that all detainees were not properly subject to detention. 152 Cong. Rec. S10243, *S10260 (statement of Sen. Bingaman) ("The likelihood is that some, and maybe many, of these prisoners have very little to do with terrorism. According to a 2002 CIA report, most of the Guantanamo prisoners 'did not belong there.' According to a Wall Street Journal article earlier this year, an estimated 70 percent of individuals held at Guantanamo were wrongfully imprisoned. BG Jay Hood, the former commander at Guantanamo, was quoted as saying, 'Sometimes, we just didn't get the right folks.'")

[6] The specific language of the MCA provides for the punishment of past conduct. MCA § 948a(1)(A)(ii). The MCA states that "[a] military commission under this chapter shall have jurisdiction to try any offense made punishable by this chapter or the law of war when committed by an alien unlawful enemy combatant before, on, or after September 11, 2001." MCA § 948d(a).

name or described in terms of conduct which, because it is past conduct, operates only as a designation of particular persons.")

(9) The fiery, retributive political atmosphere that characterized the Congressional debate on the MCA is the type of atmosphere in which inappropriately punitive legislation usually arises. When legislation is written in such an atmosphere, the Constitutional prohibition on bills of attainder must be carefully adhered to. The prohibition against bills of attainder is based upon the fundamental separation of powers that define our system of government and was prompted by "the fear that the legislature, in seeking to pander to an inflamed popular constituency, will find it expedient openly to assume the mantle of judge or, worse still, lynch mob." *Nixon v. Adm'r. of Gen. Servs.*, 433 U.S. 425, 480 (1977); *see also Brown*, 381 U.S. at 442 (the prohibition against bills of attainders was intended "as an implementation of the separation of powers."). In *United States v. Lovett*, the Supreme Court observed that:

> Those who wrote our Constitution well knew the danger inherent in special legislative acts which take away the life, liberty, or property of particular named persons, because the legislature thinks them guilty of conduct which deserves punishment. They intended to safeguard the people of this country from punishment without trial by duly constituted courts. …When our Constitution and Bill of Rights were written, our ancestors had ample reason to know that legislative trials and punishments were too dangerous to liberty to exist in the nation of free men they envisioned. And so they proscribed bills of attainder.

328 U.S. at 317-318.

b. The MCA Inflicts Legislative Punishment on a Specific Group and is therefore Unconstitutional.

(1) The constitutional prohibition again bills of attainder is "to be read in light of the evil the Framers sought to bar: legislative punishment, of any form or severity, of specifically designated persons or groups." *Brown*, 381 U.S. at 446. The MCA imposes a number of specific punishments on "alien unlawful enemy combatants" that deprive this group of procedural rights, including the fundamental right to a fair trial. Specific punishments imposed by the MCA include, but are not limited to:

- depriving targeted individuals all rights under the Geneva Conventions, MCA § 948b(g);
- suspending rules that bar hearsay evidence, MCA § 949a(b)(2);[7]

[7] Military Rules of Evidence 801-07 applied to military commission at the time of the alleged conduct and prior to 17 October 2006. *See* 10 U.S.C. §§ 821, 836 (1998); *Hamdan*, 548 U.S. at 623-24.

- allowing coerced testimony to be introduced into evidence even if the evidence is obtained as a result of cruel, inhuman, or degrading treatment (if the 'degree of coercion' involved is disputed), MCA § 948r;

- imposing significant limitations on a individual's ability to call witnesses in his defense, MCA § 949j, RMC 703(c)(2);

- depriving targeted individuals of the right to bring an action addressing or redressing egregious treatment at the hands of one's jailers, MCA § 7(a).[8]

(2) Each of the restrictions set forth above constitutes an impermissible legislative punishment. In *Cummings*, the Court held that provisions of the Missouri Constitution operated as a bill of attainder because "[t]he clauses in question subvert the presumptions of innocence, and alter the rules of evidence." *Cummings*, 71 U.S. at 328. The MCA deprives "alien unlawful enemy combatants" of specific due process rights to which they would be entitled if they were prosecuted in either federal court or under the professional military justice system provided for in by the Uniform Code of Military Justice. "The rules of evidence" have certainly been altered by the MCA's determination that detainees brought before a military commission are subject to criminal conviction on the basis of unauthenticated, anonymous, and hearsay evidence. *See* MCA §§ 946b, 949a; R.M.C. 304, 801, 901. The MCA also deprives "alien unlawful enemy combatants" of the right to pursue specific claims, including those that rely on the protections of Common Article 3. MCA § 948b(g). Finally, the MCA sought to deprive "alien unlawful enemy combatants" of the protection of the Great Writ of habeas corpus. *But see Boumediene v. Bush*, 553 U.S. ___, 128 S.Ct. 2999, 2262 ("We hold that Art. I, § 9, cl. 2, of the Constitution has full effect at Guantanamo Bay.") This sort of "disqualification…from the privilege of appearing in courts" is an impermissible legislative punishment. *See Cummings*, 71 U.S. at 320. *See also Rasul v. Bush*, 542 U.S. 466 (2004). Notably, the "severity of a sanction is not determinative of its character as punishment." *Selective Service System*, 468 U.S. at 851.

(3) A factor that is relevant to a finding that a statute imposes legislative punishment is whether the legislative record "evinces a congressional intent to punish." *Selective Service System*, 468 U.S. at 852. As discussed above, the legislative history certainly supports a finding that Congress had the intent to punish those detained at Guantanamo.[9] Congress could have

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[8] Most significantly, as enacted, the MCA sought to deprive "alien unlawful enemy combatants" of the writ to habeas corpus relief. MCA § 7(a). This provision of the MCA was struck down by *Boumediene v. Bush*, 128 S.Ct. 2229 (2008). This statutory provision stands as evidence of Congressional intent to inflict legislative punishment at the time of the MCA's enactment.

[9] During hearings prior to the enactment of the MCA, Senators expressly indicated that they did not want aliens to receive the same rights as citizens. See *The Future of Military Commissions*: *Hearing before the Senate Committee on Armed Services*, 109th Cong. (2006) (statement of Sen. James Inhofe) ("I want to make sure that we have everything in place here in Congress to make sure that the attorney-client privileges are not given to the detainees, at least not to the same extent that they be to American citizens."). *See also* 152 Cong. Rec. S10395 (statement of Sen. Cornyn) (aliens "do not deserve the same panoply of rights preserved for American citizens in our legal system."); 152 Cong. Rec. S10243, *S10274 (statement of Sen. Bond) ("These people are not U.S. citizens….they are, by definition, aliens engaged in or supporting terrorist hostilities against the U.S.")

opted to permit "alien unlawful enemy combatants" to be tried in regularly constituted courts of the military justice system as it required before the MCA was enacted. *See* MCA §§ 821, 836; *Hamdan*, 548 U.S. at 623-24. Instead, Congress chose to draft a set of procedural rules for a specific group of persons because of determination that they were deserving of punishment based on their past conduct or associations. Notably, Congress considered and rejected a version of the bill that would have tracked the courts-martial procedures much more closely and thereby eliminated many of the punitive aspects of the current Commission process. *See* 152 Cong. Rec. S10,263 (daily ed. Sept. 27, 2006) (rejecting a substitute bill written by the Senate Armed Services Committee and proposed as an amendment by Senator Levin).[10] The fact that Congress could have achieved legitimate non-punitive goals in a less burdensome manner but chose the more restrictive route, is evidence that the MCA's provisions and restrictions constitute impermissible legislative punishment. *See Nixon v. Adm'r of Gen. Servs.*, 433 U.S. at 482 (noting "the existence of less burdensome alternatives by which [the] legislature….could have achieved its legitimate nonpunitive objectives.")

3. <u>This Commission Must Dismiss all Charges Against Mr. al Qosi because the Statutory Basis for Jurisdiction in this Case is Unconstitutional.</u>

Because the MCA identifies a specific group of people, grouped according to a Governmental determination as to the nature of their past conduct and associations, and then imposes legislative punishment on those individuals due to a perception that they pose a danger to our national security, the MCA must be struck down as unconstitutional. *Trop v. Dulles*, 356 U.S. at 103-104 ("The provisions of the Constitution are not time-worn adages or hollow shibboleths….When it appears that an Act of Congress conflicts with one of these provisions, we have no choice but to enforce the paramount commands of the Constitution….We cannot punish back the limits of the Constitution merely to accommodate challenged legislation.") This Court therefore has no jurisdiction over Mr. al Qosi and must dismiss all charges.

In the alternative, and in order to avoid constitutional difficulties, the MCA should be interpreted to apply only prospectively.

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[10] Senator Levin described the bill that was ultimately passed as "the product of negotiations" "with an administration that has been relentless in its determination to legitimize the abuse of detainees *and to distort military commission procedures to ensure criminal convictions*." 152 Cong. Rec. S10244 (statement of Sen. Levin). (emphasis added). Senator Reed noted that, unlike the rejected version of the bill, which "start[ed] with the rules applicable in trials by court-martial as the governing provision, and then establish[ed] exceptions," in the enacted version "the Secretary of Defense is required to make trials by military commissions consistent with those roles only when he considers it is practical. The exception has swallowed up the rule." 152 Cong. Rec. S10529 (statement of Sen. Reed).

6. **Oral Argument**: The Defense requests Oral Argument as it is entitled to pursuant to R.M.C. 905(h). Oral argument will assist the Court in understanding and resolving the issues presented by this motion.

7. **Certificate of Conference**: The Defense has conferred with the Prosecution regarding the requested relief. The Prosecution objects to the requested relief.

8. **Additional Information**: In making this motion, or any other motion, Mr. al Qosi does not waive any of his objections to the jurisdiction, legitimacy, and/or authority of this Military Commission to charge him, try him, and/or adjudicate any aspect of his conduct or detention. Nor does he waive his rights to pursue any and all of his rights and remedies in all appropriate forums.

Respectfully submitted,

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[redacted]